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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of)
)
International Settlement Rates) File No. IB 96-261

OPPOSITION TO PETITIONS FOR RECONSIDERATION

AT&T Corp. ("AT&T"), pursuant to Section 1.429 (f) of the Commission's Rules, opposes the Petition for Reconsideration of the Philippines Parties and the Petition for Clarification or Reconsideration filed by MCI Telecommunications Corporation ("MCI") of the Report and Order[1] in the above-referenced proceeding.

I. THE *BENCHMARK ORDER* IS A VALID EXERCISE OF THE COMMISSION'S AUTHORITY TO REGULATE U.S. CARRIER PRACTICES.

In the Report and Order in this docket, the Commission correctly concluded that its "authority to reform U.S. carrier participation in international settlement rate practices," ¶ 278, extends to the authority "to adopt settlement rate benchmarks." (¶ 275). The Philippine Parties now seek reconsideration, claiming (p. 6) that the Order is "an attempt to exert unlawful authority over both Philippine regulatory bodies and carriers." Stripped of its rhetoric, the Philippine Parties' Reconsideration Petition does little more than repeat arguments that were fully considered, and rejected, in the Commission's original Order. Those claims are not only meritless, but they also rest on a

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1 *International Settlement Rates*, IB Docket No. 96-261, Report and Order, rel. Aug. 18, 1997, FCC 97-280 ("*Benchmark Order*").

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demonstrably false premise -- that the Commission has attempted to "determine the lawfulness of charges by foreign entities" (p. 7).

1. **The Commission Did Not Exceed its Authority Under the Communications Act.**

Throughout their Reconsideration Petition, the Philippine parties repeatedly argue that the Commission exceeded its authority in setting settlement rate benchmarks because the Commission may not (p. 8) "assume jurisdiction over the rate base of Philippines carriers." Contrary to these parties' persistent mischaracterization of the Commission's Order, however, the Commission could not have been clearer in stating that its rules operate as a "direct constraint on our U.S. carriers," and that they do not "constitute the exercise of jurisdiction over foreign carriers." (¶ 279). As the Commission further explained, any "enforcement actions" it would take in the future to assure compliance with its rules would "'apply to U.S. carriers within our jurisdiction, not to the foreign correspondents.'" *Id.* (quoting *Notice*, ¶ 279). The Philippine Parties' extended discussion (pp. 6-9) of the Commission's authority over foreign carriers is thus simply irrelevant.

Apparently recognizing this problem, the Philippine Parties (at pp. 9-10) alternatively cite *RCA Communications, Inc.* v. *United States*, 43 F. Supp. 851 (S.D.N.Y. 1942), for the proposition that the Commission's jurisdiction under sections 201 and 205 is limited to regulating the rates that U.S. carriers may charge end users, and does not extend to regulating the amount that U.S. carriers pay their foreign correspondents pursuant to their contractual arrangements. However, the Philippine Parties' claim is based on a misapprehension of the full extent of Judge Hand's holding in *RCA*.

Although the order at issue in RCA directly regulated the amount that U.S. telegraph carriers could charge their customers for urgent messages between the U.S. and foreign destinations, the order's effect, and thus the holding in *RCA,* was not so limited. As Judge Hand explained the facts before the three-judge district court, the "rates to be charged end users" for messages traveling over the international circuits were "fixed by agreement between" the U.S. and foreign carriers, and the "tolls collected [were] shared upon an agreed basis." Those toll charges covered transmission from the point of origin to the point of destination, and "the portions of the tolls belonging to the various foreign administrations and companies involved in the complete service [were] remitted" to the foreign carriers by the originating U.S. carrier. Because the foreign carriers' revenue depended on the amount collected by the originating U.S. carrier, the contracts at issue in *RCA* specified that if "either party wishe[d] to make a change in any rate to be charged for messages," it was "necessary to secure the consent of the company or administration which handles the other end." 43 F. Supp. at 853.

Thus, even though the order at issue in *RCA* literally limited the amount that U.S. carriers would collect from their customers for transmission of urgent telegraph messages, the effect of the order was thus clearly to limit the amount that U.S. carriers would remit to their foreign correspondents for their share of the charges. Because *RCA* involved a "joint rate," the order was attacked on the ground that it was "directed against foreign countries." 43 F. Supp. at 854. Contrary to the Philippine Parties' assertions, Judge Hand upheld the Commission's order in *RCA* on the explicit understanding that, by "forbid[ding] the plaintiff from participating in messages at the 2 to 1 ratio," the order in question would "impair[] the obligations" of RCA under its contracts. RCA, 43 F. Supp. at 855. As the

Court explained:

> While the Commission's order of May 27, 1941, would have the effect of impairing the obligations of the plaintiff and other telegraph companies in respect to foreign radiotelegraphic rates established under their prior agreements with foreign governments or nationals, Congress had the power to regulate communication between the United States and foreign points, and to regulate the carriers engaged within the United States in such communication, regardless of whether the effects of the regulation might extend beyond our territory. All contracts which the carriers might make were subject to the power of Congress to regulate foreign commerce. . . . To carry out the reduced ratio is impracticable, if not impossible, without making new agreements with the foreign governments or nationals. . . . [But i]f the 2 to 1 ratio for Urgent messages is too high, it surely is unreasonable for the public to be compelled to pay for them at that rate merely because the carriers have so agreed among themselves.

43 F. Supp. at 855. The *RCA* court thus clearly held that the Commission could modify rates established in contracts between U.S. and foreign carriers, and thereby reduce payments made by U.S. carriers to their foreign correspondents.

The Philippine Parties next claim (p. 13) -- that the Commission's conclusion that U.S. carrier settlement arrangements with foreign correspondents is a "practice in connection with foreign communication service" (¶ 26) is "overreaching" because the Commission's rationale would justify regulation of the "rates charged by the advertising media [and] lawyers" to carriers -- is equally unavailing. To begin with, section 201(b) explicitly authorizes the Commission to regulate not only a carrier's practices and charges "for" communication services, but also "in connection with" such services. At the very least, this language shows that Congress did not intend to limit the Commission's jurisdiction to those charges and practices that are directly for services, but understood that the Commission's powers would include practices "in connection" with such services. While payments made by carriers to advertisers and lawyers might fall outside of the nexus contemplated by section 201, arrangements between carriers for communications services are at the core of the Communications Act's scope. That is why section 211 -- which the Philippine Parties simply ignore -- permits the Commission to require all contracts between carriers to be filed, but requires by its own terms that "contracts" between carriers "in relation to any traffic" be filed even absent prior Commission order. 47 U.S.C. ' 211(a). Obviously, Congress understood that the Commission's jurisdiction would extend, at the very least, to regulating inter-carrier arrangements relating to the carriage of "traffic."

Equally frivolous is the Philippine Parties suggestion that the Commission's rules are invalid because the Commission must first "conven[e] a hearing under section 205" before prescribing practices. Section 205 fully authorizes the Commission to prescribe rates and practices, so long as it provides an "opportunity for hearing" and concludes that existing practices are or would be unreasonable. 47 U.S.C. ' 205. The Commission's proceedings here clearly satisfy these requirements. It is well settled that, unless a statute requires that a hearing be "on the record," which section 205 does not, a notice and comment procedure satisfies the requirement of a "hearing."[2] The Philippine Parties do not deny that the Commission's Notice provided ample warning that the Commission was considering prescribing accounting rate benchmarks that would be binding on U.S. carriers, and admits (p. 15) that the Commission's procedures allowed it "to file comments

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2 *See United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 234-35 (1973) (notice and comment procedures sufficient even in ratemaking case); *Railroad Comm'n of Texas v. United States*, 765 F.2d 221, 227 (D.C. Cir. 1985); *AT&T v. FCC*, 572 F.2d 17, 21-23 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); *Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250, 1264-68 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

just as any other interested party." Moreover, the Commission explicitly found in the Order "that it would be an unjust and unreasonable 'practice' or 'charge' for a U.S. international carrier to pay settlement rates above the relevant benchmark rate." (¶ 291). The notice-and-comment procedure followed by the Commission, combined with its requisite finding that above-benchmark payments are an unjust and unreasonable practice, fully satisfied section 205's procedural requirements.

2. <u>The Commission's Order Does Not Contravene the ITR.</u>

In their original comments, numerous foreign carriers claimed that the Commission's proposed rules would violate the International Telecommunications Regulations, which provide that accounting rates would be established "by mutual consent." ITR, art. 6.2.1. In response, AT&T, among others, pointed out that not only did the treaty establishing the ITU Regulations acknowledge the "sovereign right of each country to regulate its telecommunications," International Telecommunications Regulations (Melbourne 1988), Dec. 9, 1988, S. Treaty Doc. No. 13, 102d Cong., 1st. Sess. (1991) ("ITR"), at 8 (Preamble), but that the United States in acceding to the ITR specifically "reserve[d] its rights to take whatever act it deems necessary, at any time, to protect its interests." *<u>Id.</u>* at 76 (Statement No. 69). Accordingly, as the Commission correctly concluded, "the ITR do not suggest that governments cede sovereignty over telecommunications carriers that operate in their markets." (¶ 311).

Remarkably, the Philippine Parties now apparently concede that "the ITR does not require the United States to cede sovereignty over its own carriers" (p. 18), and instead argue that those regulations "do[] not grant the United States hegemony over other nations' carriers." (p. 18) The short but complete response to this argument is that, as discussed above, the Commission's rules are quite careful in limiting their binding effect to U.S. carriers, and do not regulate, let alone declare "hegemony" over, "other nations' carriers."

3. **The Order Does Not Violate the Principle of International Comity.**

In a final (and desperate) attempt to contest the Commission's jurisdiction to issue the benchmarks, the Philippine Parties claim (p. 20) that the Order is "equivalent to dictating what foreign carriers may charge for terminating international traffic in their own countries," and thus violates the principle of international comity. This claim is baseless. To begin with, it is premised on the false assertion that the Order regulates foreign carriers. As explained above, the Order regulates only U.S. carrier practices. *See supra.*

The Philippine Parties' mischaracterization of the Commission's rules is no accident. The principle of comity applies only where "'there is in fact a true conflict between domestic and foreign law,'" *Hartford Fire Ins. Co.* v. *California et al.*, 509 U.S. 764, 798 (1993) (internal citation omitted), such that "compliance with the laws of [two] countries [would be] impossible." 509 U.S. at 799. Because the Commission's rules apply by their terms only to the conduct of U.S. carriers, and because foreign jurisdictions would likewise be limited to regulating their own carriers, no carrier could be subject to conflicting jurisdictions' laws as a result of the Commission's rules. In these circumstances, "international comity would not counsel against exercising jurisdiction." 509 U.S. at 798.[3]

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3 Equally unavailing is the claim (p. 23) that the Order would harm the U.S. public interest by reducing the development of foreign telecommunications infrastructure. In fact, the transition periods adopted by the Order are intended to minimize any undue

(footnote continued on following page)

II. THE BENCHMARK ENTRY CONDITION SHOULD APPLY TO ALL FACILITIES-BASED CARRIERS ON ALL ROUTES.

The Order (¶ 219) finds that above-cost settlement rates allow a foreign affiliated carrier to "engage in price squeeze behavior on the affiliated route by virtue of its dual role as a provider of an above-cost input and a competitor in the retail market using that input." As a preventive measure, because of the serious consequences of such conduct, the Commission will "condition any such [facilities-based] authority to serve an affiliated market on the affiliated carrier offering U.S. international carriers a settlement rate for the affiliated market at or below the relevant benchmark adopted in this order." (¶ 231) Similarly, existing section 214 holders serving affiliated markets are thus required to negotiate and establish with all U.S. international carriers a settlement rate at or below the appropriate benchmark within 90 days of the effective date of the Order.

MCI proposes (p. 2) that this requirement should apply to existing Section 214 holders only where traffic between the relevant affiliates is greater than 25 percent of the total inbound or outbound traffic on the route, or where either party controls bottleneck services or facilities at the U.S. or foreign end of the route. Alternatively, MCI asks the Commission (p. 4) to make clear that it will entertain waivers of this requirement for existing Section 214 holders if implementation is precluded by foreign laws or regulations.

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disruption to foreign telecommunications networks. (¶¶ 22, 108). Moreover, as the Commission observes (¶ 144), "open and competitive markets that welcome private capital offer a more reliable and sustainable means to finance infrastructure development than the traditional accounting rate system."

MCI fails to justify the exemptions it seeks. The Commission found (¶ 228) "no reason to exempt carriers with existing authorizations from complying with conditions that will apply to all other carriers providing facilities-based service to other markets." The Commission further explained (*id.*) that "[t]he same concerns about anticompetitive behavior we seek to address through our conditions apply equally to carriers with existing authorizations."

MCI does not show that the ability to engage in price squeeze behavior is limited to carriers controlling bottleneck facilities or to those with more than 25 percent of the inbound or outbound traffic on a route. It is also unclear that offering lower foreign market termination prices would necessarily put smaller carriers at a "serious competitive disadvantage" in the foreign market, as MCI also claims (p. 2 (emphasis added)). Indeed, the prospect of competition in the foreign market leading to lower termination prices is a major potential benefit of foreign market liberalization for U.S. carriers and consumers.

Rather than introduce the exemptions sought by MCI, the Commission should maintain the benchmark condition for all facilities-based carriers operating in the U.S. on all affiliated routes. Without clear evidence that the anticompetitive concerns addressed by the condition are limited in the ways claimed by MCI, the Commission should apply the rule on a non-discriminatory basis as required by the *Benchmark Order*. Issues relating to enforcement, such as the foreign laws or regulations to which MCI refers, should be addressed on a case-by-case basis.

CONCLUSION

For the above-mentioned reasons, the Petition for Reconsideration of the Philippines Parties and the Petition for Clarification or Reconsideration filed by MCI should be denied.

Respectfully submitted,

AT&T CORP.

By James Talbot

Mark C. Rosenblum
Lawrence J. Lafaro
James J. R. Talbot

Room 3252H3
295 North Maple Avenue
Basking Ridge, New Jersey 07920
(908) 221-8023

Gene C. Schaerr
Daniel Meron
1722 Eye Street N.W.
Washington, D.C. 20006

Dated: October 24, 1997

CERTIFICATE OF SERVICE

I, Helen Elia, do hereby certify that on this 24th day of October, 1997, a copy of the foregoing "Opposition to Petitions for Reconsideration" was mailed by U.S. first class mail, postage prepaid, upon the parties on the attached service list:

Helen Elia

Helen Elia

SERVICE LIST

Ambassador Vonya B. McCann
United States Coordinator
Bureau of International
Communications and
Information Policy
Department of State
Room 4826
2201 C Street, N.W.
Washington, DC 20250-1428

Joan Donoghue
Assistant Legal Adviser for
Economic, Business and
Communications Affairs
Office of the Legal Adviser
2201 C Street, N.W.
Department of State
Washington, DC 20520-6310

Robin R. Layton
ITA
Department of Commerce
Room 4324
14th St. & Constitution NW
Washington, DC 20230

Richard Beaird
Bureau of International
Communications and
Information Policy
Department of State
Room 4836
2201 C Street, N.W.
Washington, DC 20520-1428

Steven Lett
Bureau of International
Communications and
Information Policy
Department of State
Room 4826
2201 C Street, N.W.
Washington, DC 20520-1428

Anthony Cina
Bureau of International
Communications and
Information Policy
Department of State
Room 4826
2201 C Street, N.W.
Washington, DC 20520-1428

Gary Couey
Bureau of International
Communications and Information
Policy
Department of State
Room 4826
2201 C Street, N.W.
Washington, D.C. 20520

Shirl Kinney
Deputy Assistant Secretary
for Communications and
Information
NTIA
Department of Commerce
Room 4898
14th Street & Constitution, N.W.
Washington, D.C. 20230

Suzanne Settle
Senior Policy Advisor
Department of Commerce NTIA
Room 4701
14th St. & Constitution, N.W.
Washington, DC 20230

Jack Gleason,
Acting Administrator
Office of International
Affairs
Department of Commerce NTIA
Room 4701
14th St. & Constitution, N.W.
Washington, DC 20230

Larry Irving
Assistant Secretary for
Communications and
Information
Department of Commerce NTIA
Room 4898
14th St. & Constitution, N.W.
Washington, DC 20230

Barbara Wellberry
Chief Counsel
Department of Commerce NTIA
Room 4713
14 St. & Constitution Ave. NW
Washington, DC 20230

Cathleen Wasilewski
Attorney Advisor, Office of
Chief Counsel
Department of Commerce NTIA
Room 4713
14th St. & Constitution N.W.
Washington, DC 20230

John Dalton
Secretary of the Navy
Office of the Secretary
Department of the Navy
The Pentagon
Washington, DC 20310

Dr. James E. Soos
Deputy Assistant Secretary
of Defense for C3
Room 3E194
6000 Defense Pentagon
Washington, DC 20301-6000

Carl Wayne Smith, Esq.
Code AR Defense Information
Systems Agency
701 South Courthouse Road
Arlington, VA 22204

Office of General Counsel
National Security Agency
9800 Savage Road
Fort Meade, MD 20755-6000

Robert S. Koppel
VP - Legal & Regulatory
Affairs
IDB Worldcom
15245 Shady Grove Road
Suite 460
Rockville, MD 20850-3222

John Scorce
Kenneth A. Schagrin
Larry Blosser
MCI International, Inc.
1801 Pennsylvania Ave., N.W.
Washington, DC 20006

Gail Polivy, Esq.
GTE Hawaiian Telephone Company
1850 M Street, N.W.
Washington, DC 20036

Keith H. Fagan
COMSAT Communications
6560 Rockspring Drive
Bethesda, MD 20817

Michael Fingerhut
Leon Kestenbaum
Kent Nakamura
Sprint Communications
Company L.P.
1850 M Street, N.W.
Washington, DC 20036

Antonio M. Meer
Meer, Meer & Meer
9th Floor, PLDT Building
Lesgapi Street
Maklati, Metro Manila
Philippines

Albert Halprin
J. Randall Cook
Halprin, Temple, Goodman
& Sugrue
1100 New York Ave., N.W.
Suite 650 East
Washington, DC 20005